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Wal-Mart Stores, Inc. *and* United Paperworkers International Union. Cases 18–CA–14757 and 18–CA–15017

September 17, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On December 14, 1999, Administrative Law Judge C. Richard Miserendino issued the attached decision. The Respondent filed exceptions and a supporting brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified and set forth in full below.[2]

The Respondent's exceptions relate only to the judge's findings that the Respondent (1) threatened employee Deborah Hager in violation of Section 8(a)(1) of the Act, (2) changed the work schedule of employee Sherry Nelson[3] in violation of Section 8(a)(3) and (1) of the Act, and (3) instructed its 22 department managers that they could not participate in union activities, that it would be unlawful for them to do so, and that they were to report union activity to management, in violation of Section 8(a)(1) of the Act. For the reasons set forth by the judge, we affirm his findings that the Respondent unlawfully threatened employee Deborah Hager. For the reasons set forth below, we find that the Respondent changed the schedule of employee Sherry Nelson in violation of Section 8(a)(3) and (1) of the Act, and that the Respondent's instructions to four department managers who were not statutory supervisors violated Section 8(a)(1) of the Act.

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] Neither the General Counsel nor the Charging Party has filed exceptions. Although the Respondent has filed exceptions, it has not excepted to the judge's findings that it violated Sec. 8(a)(1) of the Act by implementing and maintaining a broad rule prohibiting employees from discussing their wages and benefits among themselves and by telling employees that they would be terminated if they did so.

[3] Occasionally, the judge mistakenly referred to this employee as Shirley Nelson.

I. SHERRY NELSON'S SCHEDULE CHANGE

A. Relevant Facts

This case involves the Respondent's Store 1609 in Grand Rapids, Michigan. Sherry Nelson was a sales associate in the store's lawn and garden department. From October 1995 until October 1, 1998,[4] she worked from 6 a.m. until 3 p.m. on Mondays through Fridays, even though the work hours on Nelson's printed schedule were from 7 a.m. until 4 p.m., and included some weekends. Nelson's department manager, Shirley Heaton, and Store Manager Mike Shockley had full knowledge of the hours that Nelson actually worked. Effective October 1, 1998, Shockley changed Nelson's schedule to require her to work from 7 a.m. until 4 p.m., and to work on weekends. The judge found that Shockley changed Nelson's schedule because of her union activity in violation of Section 8(a)(3) of the Act. We agree with the judge's finding.

In late 1997, the Union[5] began a campaign to organize the retail work force, including department managers, at Store 1609. In late January or early February 1998, Nelson distributed to sales associates and some department managers information about unions she gathered from the internet and encyclopedias. In addition, she frequently talked to employees about unions and also attended union meetings. The Respondent does not dispute that it knew of these union activities by Nelson. On one occasion, Nelson even informed Store Manager Shockley that she was going to encourage other employees to attend union meetings.

In late February or early March, Shockley told another employee, Deborah Hager, that he and the assistant store manager, Rachelle Branstrom, took personally the Union's organizational drive. In March or April, Shockley told Nelson he did not understand why the employees were seeking out a union because the employee complaints that he had heard about were petty. Nelson disagreed with Shockley, and suggested that a group of employees should get together and raise their problems with the Respondent's headquarters management in Bentonville, Arkansas. Shockley advised Nelson that a group visit to headquarters would not be possible.

On Thursday, October 1, Assistant Store Manager Branstrom asked Nelson why she had come in at 6 rather than at 7 a.m., and advised her that starting immediately she must begin working 7 a.m. to 4 p.m. in accordance with the printed schedule, which also required Nelson to work on the weekend. Nelson protested to Branstrom that Shockley had always approved her deviation from

[4] All dates hereafter are in 1998 unless otherwise noted.

[5] United Paperworkers International Union.

the printed schedule, but Branstrom refused to permit her to work her former schedule. Nelson also complained to Shockley about the schedule change, but nothing was done to restore her former schedule.

On October 5, stocker Robbie Bartick was in at 6 a.m. doing the work that Nelson had previously done during that time. Bartick, who reported directly to Shockley rather than to Branstrom, was not working according to her printed schedule. She was permitted to vary from the printed schedule for transportation reasons and so that she could pick up her mail at the post office before it closed.

B. Discussion

The complaint alleges that Nelson's schedule change violated Section 8(a)(3) and (1) of the Act. To prove such an allegation, the General Counsel has the initial burden of establishing that the employee's protected activity was a motivating factor in the Respondent's decision. See *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management*, 462 U.S. 393 (1983). The elements commonly required to support such a showing are union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer. *Briar Crest Nursing Home*, 333 NLRB 935, 936 (2001).

The judge found that the General Counsel had met his burden by showing that: Nelson distributed literature and talked to employees about unions and attended union meetings; the Respondent knew of this protected activity by Nelson; and the Respondent had exhibited antiunion animus in Shockley's statement to Nelson that he could not understand why the employees wanted to organize. The judge also relied on the timing of the schedule change shortly after Shockley was served with the unfair labor practice complaint,[6] and on the Respondent's disparate treatment of Nelson. For the reasons stated below, we agree with the judge that the General Counsel has met his burden of establishing that Nelson's protected activity was a motivating factor in the Respondent's decision to change her schedule.

It is undisputed that Nelson engaged in the protected activity found by the judge and that the Respondent knew of it. In addition, the Respondent's antiunion animus has been sufficiently established by its independent violations of Section 8(a)(1) of the Act. This includes the Respondent's unlawful implementation of a broad rule prohibiting employees from discussing their wages and benefits among themselves and the directive that employees would be terminated for doing so; it also includes the Respondent's implicit threat to employee Deborah Hager that she would be fired for her union activity. We also find, in agreement with the judge, that the Respondent's antiunion animus was demonstrated by the Respondent's disparate treatment of Nelson[7] and the timing of the schedule change shortly after Shockley received the complaint. Thus, we find that the General Counsel met his initial burden under *Wright Line*.

Our dissenting colleague argues that the General Counsel did not meet his *Wright Line* burden. He maintains that the General Counsel failed to establish that the Respondent knew that Nelson was a union supporter because Nelson's activity did not identify her as a union supporter, but consisted merely of neutral discussions and sharing of neutral information about unions. Our colleague finds that the fact that the Respondent may have viewed Nelson as a "fence-sitter" precludes a finding of unlawful discrimination against her. We disagree.[8]

Section 8(a)(3) does not require that an employee be explicitly prounion to be protected against discrimination, but rather prohibits all employer discrimination in terms and conditions of employment that is intended to discourage or encourage employees' union support. See, e.g., *Dawson Carbide Industries*, 273 NLRB 382, 389 (1984), enfd. 782 F.2d 64 (6th Cir. 1986) ("The Board has held in the context of a union organizing drive that an employer's [adverse action against] uncommitted, neutral, or inactive employees in order to . . . discourage employee support for the union is violative of Section 8(a)(3) of the Act.") Thus, under Section 8(a)(3), even

[6] Shockley was served with a copy of the complaint on or about July 30. Paragraph 5(e) of the complaint specifically alleges that Shockley unlawfully solicited grievances from employees and implied a promise of benefit by suggesting that employees form a committee to discuss their problems with headquarters. Thus, although Nelson is not specifically named in the complaint, the complaint allegations unquestionably pertain to Nelson. Shockley admitted that he and the other managers discussed changing Nelson's schedule in late July-early August.

[7] At least two other employees, Robbie Bartick and Carol Riendeau, were allowed to work hours different from those set forth in their printed schedules in order to accommodate their personal schedules. Also, there is no evidence that, aside from Nelson, any other employees had their schedules changed around this time.

[8] Our colleague insists that Nelson engaged in only union-neutral conduct, and that there is no evidence establishing that the Respondent knew or even suspected that Nelson was a supporter of the Union. It is difficult to imagine how the Respondent could not have considered Nelson to be prounion, especially given that Nelson constantly focused the employees' attention on the Union by distributing union literature and engaging employees in conversation about the Union, invited employees to the Union's meetings, and stated to store manager Shockley that employee group action should be taken when she responded to Shockley's statement that he did not understand why the employees were seeking out a union because the employees' complaints were so petty.

if, as our colleague contends, Nelson were a "fence-sitter" and the Respondent believed her to be such, a finding of discrimination would not be precluded if adverse action was taken against her in order to discourage employee support for the Union.

In order to satisfy the elements of union activity and employer knowledge in this case, the General Counsel had only to show that the Respondent knew that Nelson had engaged in union activity. Whether Nelson was a "fence-sitter" or an active union supporter, she engaged in union activity and there is no dispute that the Respondent was aware of that activity. Thus, the cases relied on by our dissenting colleague are distinguishable. See *Amber Foods, Inc.*, 338 NLRB No. 84, slip op. at 3 (2002); *Webco Industries*, 334 NLRB 608, 608–609 (2001). In those cases, the General Counsel did not merely fail to show that the employer knew whether the employees were active union supporters or "fence-sitters," but failed to show that the employer knew that the employees had engaged in *any* protected activity at all. Here, by contrast, the Respondent does not dispute that it knew that Nelson engaged in protected activity.

Furthermore, although Nelson's attendance at union meetings is sufficient to establish the *Wright Line* element of employee union activity, Nelson did much more than attend union meetings. Nelson also distributed to her fellow employees printed materials on unions, and frequently talked with the employees about the Union, all of which the Respondent admits it knew. These activities focused the employees' attention on the Union, its organizing campaign and union-related issues. Additionally, Nelson directly assisted the Union by inviting employees to the Union's meetings, and she specifically advised Shockley that she was inviting employees to union meetings. Further, when Shockley stated to Nelson that he did not understand why the employees were seeking out a union because the employee complaints were petty, Nelson disagreed with him and suggested that a group of employees should get together and raise their problems with the Respondent's headquarters. Nelson's union activities and her statements to Shockley supportive of employee group action are generally not the type of conduct that would endear an employee to an employer that harbors antiunion animus, such as the Respondent.

In sum, the General Counsel has met his burden of showing that Nelson engaged in protected activity, that the Respondent knew she engaged in that activity, and that the Respondent demonstrated antiunion animus. For these reasons, we agree with the judge that the General Counsel has met his burden of showing that Nelson's protected activity was a motivating factor in the Respondent's change of her schedule.

Once the General Counsel met his burden of showing the Respondent's unlawful motivation for Nelson's schedule change, the burden shifted to the Respondent to prove its affirmative defense that it would have taken the same action in the absence of Nelson's protected activity. See *Wright Line*, supra, 251 NLRB at 1089; *Briar Crest Nursing Home*, supra, 333 NLRB at 936. For the reasons set forth by the judge, we agree that the Respondent failed to meet its burden.

Accordingly, we find that Nelson's schedule change violated Section 8(a)(3) and (1) of the Act.

II. THE RESPONDENT'S INSTRUCTIONS TO DEPARTMENT MANAGERS

A. Background

Store Manager Shockley was directly responsible for the operation of the store as a whole. The store had approximately 33 separate merchandising areas of different sizes containing different types and amounts of products. These merchandising areas were divided into three separate and stable groups, each of which was overseen by one of three assistant store managers, who, after some period of oversight, rotated over a different group. The three assistant store managers reported to Shockley.

Each department manager in this case reported to the assistant store manager of the group that included the department manager's merchandising area(s). In the three groups, there were a total of 23 department managers, only 22 of whom are at issue here.[9] Most of the department managers were responsible for one merchandising area, but a few were responsible for more than one. The department managers worked in their departments primarily during the day, Monday through Friday.

The departments were also staffed by sales associate employees (associates or employees), who worked days, evenings, and weekends. At any one time, there were approximately 90 associates working in the store, although some of those, such as cashiers, stockers and maintenance workers, worked in nonmerchandising departments.

In late 1997 and early 1998, some associates in Store 1609 began an organizing campaign to seek representation by the Union. On several occasions in February of

[9] One of the 23 department managers simultaneously held a support team manager position. The 6 to 8 support team managers helped the assistant store managers with a wide range of duties while simultaneously holding other positions for the Respondent. The counsel for the General Counsel conceded that the department manager who was also a support team manager was a statutory supervisor. Thus, the counsel for the General Counsel did not allege that the Respondent's instructions to that individual violated Sec. 8(a)(1).

1998, the Respondent instructed the 22 department managers that they could not participate in union activities, that it would be unlawful for them to do so, and that they were to report union activity to management. The Respondent does not dispute that it gave those instructions to the department managers, or that the instructions would be unlawful if given to nonsupervisory employees. Rather, the Respondent argues that its instructions do not violate the Act because the department managers are supervisors pursuant to Section 2(11) of the Act.

B. Discussion

If the department managers were statutory supervisors, the Respondent's instructions to them would be lawful. See *Harvey's Resort Hotel*, 271 NLRB 306, 307 (1984) (finding that employer's instructions to floormen not to discuss the union or attend union meetings did not violate the Act due to floormen's previously determined status as statutory supervisors). Section 2(11) of the Act defines who is a "supervisor" of the employer in the disjunctive; exercise of any one of the listed indicia is sufficient to confer supervisory status.[10] *Entergy Systems & Services*, 328 NLRB 902 (1999); *Queen Mary*, 317 NLRB 1303 (1995), enfd. sub nom *NLRB v. RMS Foundation, Inc.*, 113 F.3d 1242 (9th Cir. 1997). To confer supervisory status, any Section 2(11) authority must be used on behalf of management, with independent judgment, and not in a routine or clerical manner. See *Masterform Tool Co.*, 327 NLRB 1071 (1999); *Bowne of Houston*, 280 NLRB 1222, 1223 (1986). It is the *possession of authority* to engage in any of the functions listed in Section 2(11), not the actual *exercise* of that authority, which determines whether an individual is a supervisor. *Pepsi-Cola Co.*, 327 NLRB 1062, 1064 (1999); *Fred Meyer Alaska, Inc.*, 334 NLRB 646, 649 fn. 8 (2001).

Because the Act excludes any "supervisor" of the employer from the definition of "employee" entitled to the Act's protections, the Board has a duty not to construe supervisory status too broadly. *Phelps Community Medical Center*, 295 NLRB 486, 492 (1989); *Adco Electric*, 307 NLRB 1113, 1120 (1992), enfd. 6 F.3d 1110 (5th Cir. 1993). Thus, the burden of proving supervisory status is on the party asserting it, in this case the Respondent. *Chevron U.S.A.*, 309 NLRB 59, 62 (1992).

[10] Sec. 2(11) of the Act provides:

The term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The judge found that the 22 department managers at issue in this case were not supervisors under Section 2(11) of the Act. He thus found that the Respondent's instructions to them—not to participate in union activities, that it would be unlawful for them to do so, and to report union activity to management—violated Section 8(a)(1) of the Act.

The record contains individualized testimony about the functions of 10 of the 22 department managers; 8 department managers testified about their own functions, and 2 department managers' functions were described by sales associates working with them. Neither party requested that the 22 department managers be treated as a class, and the judge specifically elicited the name and department of each of the 22 department managers at issue. The Respondent contends that its 22 department managers are supervisors, relying only on their Section 2(11) authority to reward, assign, responsibly direct, and discipline employees.

We find that the Respondent did not meet its burden of proving that the following 4 department managers are statutory supervisors: Carol Riendeau, the department manager of hardware; Chris Reak, the department manager of stationery; Danny Dome, the department manager of paper goods, chemicals, and furniture; and Raegan Sack, the department manager of housewares. We so find because the Respondent has not demonstrated that those 4 department managers used independent judgment to reward or effectively recommend rewarding associates, assign or responsibly direct them, or discipline or effectively recommend disciplining them.

Rewarding

The evidence shows that the Respondent evaluated associates in writing on a yearly basis. The Respondent used the final overall rating on an associate's annual performance evaluation to determine the associate's pay raise for the following year: an outstanding final overall rating automatically resulted in a 6-percent raise, an above-standard rating automatically resulted in a 5-percent raise, a standard rating automatically resulted in a 4 percent raise, and a below-standard rating automatically resulted in no raise. Assistant store managers were often present during the associates' yearly performance discussions, signed the final evaluations, and had ultimate responsibility for their completion. Some assistant store managers, however, delegated most of the evaluation functions to department managers.

Riendeau (hardware) testified that she identified associates' strengths and weaknesses for her assistant store manager but did not know or decide the associates' final performance rating. Virginia Pittack, an associate in stationery, testified that the store manager Shockley,

rather than department manager Reak, conducted Pattack's annual performance evaluations and decided her overall performance rating. Because only the final overall performance rating was directly linked to an associate's pay increase, the above evidence fails to establish that Riendeau or Reak effectively recommended rewarding associates.[11] See *Ryder Truck Rental*, 326 NLRB 1386, 1387 fn. 9 (1998) (finding that technicians in charge were not statutory supervisors in part because there was no evidence that their input into employee evaluations involved any recommendations regarding pay increases); compare *Wal-Mart Stores, Inc.*, 335 NLRB 1310 (2001) (finding that department manager was a statutory supervisor because he determined employees' final performance rating, which was directly linked to their rate of pay increase).

Accordingly, we find that the Respondent failed to show that Riendeau, Reak, Dome, or Sack rewarded or effectively recommended rewarding employees within the meaning of Section 2(11) of the Act.

Assignment and Responsible Direction

The evidence shows that Riendeau (hardware) worked with one other employee during the day and there was no evidence that she responsibly directed or assigned work to that employee. Riendeau also testified that she left notes for the night crew about work that was unfinished at the end of her shift.[12] Yet, the work was often left undone, she completed the work herself, and no consequences were imposed on the night crews for not completing the work. Likewise, Dome (paper goods, chemicals, and furniture) only worked with other associates 1-2 hours a day, and he did not assign them work nor direct them in their work. Although he initially left notes for the night crew about work left undone, the work often remained undone for three or four days. When this problem was not resolved after Dome raised it with upper management, he stopped leaving the notes.

Similarly, Barbara Hueston, an associate in housewares, generally worked evenings and weekends, while Sack, the department manager, worked during the weekdays. Sack primarily directed Hueston by leaving her written instructions about the tasks that needed to be done, which included putting away and preparing the inventory, straightening shelves and labels, cleaning, and assisting customers. No evidence was adduced that there were adverse consequences to Hueston if she did not perform the written tasks requested by Sack.

There was no evidence that Sack's, Riendeau's, or Dome's written notes, assignment, or direction required the exercise of independent judgment.[13] Thus, we find that the Respondent failed to show that Sack, Riendeau, Dome, or Reak assigned or responsibly directed employees within the meaning of Section 2(11) of the Act.

Discipline

The evidence shows that Riendeau (hardware) talked to an employee with an assistant store manager present about the employee's poor attendance and its effects on the department. However, the assistant store manager, not Riendeau, issued a written warning to the employee. This evidence does not show that Riendeau disciplined or effectively recommended disciplining employees.[14] See *Ten Broeck Commons*, 320 NLRB 806, 808, 812–813 (1996) (although licensed practical nurses (LPNS) and a nursing supervisor met with employees accused of serious misconduct, LPNs did not effectively recommend discipline where the director of nursing and nursing supervisor determined the discipline).

We find that the Respondent failed to show that Riendeau, Reak, Dome, or Sack disciplined or effectively recommended disciplining employees within the meaning of Section 2(11) of the Act.

Thus, the Respondent did not demonstrate that Riendeau, Reak, Dome, or Sack possessed supervisory authority to reward, assign, responsibly direct, or discipline employees, or effectively to recommend such actions. Nonetheless, the Respondent implicitly argues that those four department managers are statutory supervisors because the Respondent has demonstrated that other department managers possessed such supervisory authority. However, the Respondent did not request that the judge treat the 22 department managers as a class. Under the Respondent's "Store within a Store" (SWAS) approach, each department, by design, is managed differently, so we cannot assume that the authority of every department manager is the same. Further, despite being the party with greatest access to personnel records and to other potentially relevant evidence regarding department managers' functions, the Respondent did not introduce evidence indicating that the department managers possessed uniform supervisory authority as a class.

[11] There is no record evidence regarding the authority of Dome (paper goods, chemicals, and furniture) or Sack (housewares) to recommend rewarding associates through final performance ratings. Although the Respondent argues that some department managers recommended that associates receive merit increases apart from annual percentage pay increases, there is no evidence indicating that department managers Riendeau, Reak, Dome, or Sack possessed such authority.

[12] When Riendeau was absent, the departmental associate who worked with her left similar notes for the night crew.

[13] No evidence addressed the authority of Reak (stationery) to assign or responsibly direct associates.

[14] No evidence addressed the authority of Reak (stationery), Dome (paper goods, chemicals, and furniture), or Sack (housewares) to discipline or effectively recommend disciplining associates.

To the contrary, the Respondent's store manager, Shockley, testified that only *some* department managers determined associates' final performance rating. He also conceded that assistant store managers had ultimate authority over performance evaluations, and that they only delegated that authority to department managers from time to time. Likewise, the department manager of pets, Linda Grinde, testified that whether she possessed authority to determine the final performance ratings of associates depended on who was her assistant store manager. Clearly, the record evidence fails to demonstrate that all the department managers possessed uniform supervisory authority. Thus, even assuming arguendo that the Respondent has demonstrated that other department managers possessed supervisory authority, we have no basis for inferring that Riendeau, Reak, Dome, or Sack possessed it. Compare *Pepsi-Cola Co.*, supra, 327 NLRB at 1064 (finding all account representatives to be statutory supervisors because all possessed the same authority to discharge employees even though some had not been presented with the opportunity to exercise that authority); *Fred Meyer Alaska, Inc.*, supra, 334 NLRB 646, 649 & fns. 8, 9 (finding all meat and seafood managers to be statutory supervisors because all possessed authority to hire and/or to effectively recommend hiring even though some had not been presented with the opportunity to exercise that authority).

For all the above reasons, we find that the Respondent has failed to demonstrate that department managers Riendeau, Reak, Dome, and Sack are supervisors under Section 2(11) of the Act.[15] Accordingly, we find that the Respondent's instructions to them—that they could not participate in union activities, that it would be unlawful for them to do so, and that they were to report union activity to management—violated Section 8(a)(1) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Wal-Mart Stores, Inc., Grand Rapids, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Cease and desist from

(a) Implementing and maintaining a broad rule prohibiting employees from discussing their wages and benefits among themselves.

(b) Telling employees that they are not permitted to discuss their wages and benefits among themselves and threatening them with termination if they do so.

(c) Telling its department managers who are not statutory supervisors that they cannot participate in union activities, that it would be unlawful for them to do so, and to report union activity to management.

(d) Implicitly threatening Deborah Hager or any other employees that they could be terminated because of their union activity.

(e) Changing the work schedule of Sherry Nelson or any other employees because of their union activity.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind the rule prohibiting employees from discussing their wages and benefits among themselves.

(b) Return Sherry Nelson to the schedule that she was working prior to October 1, 1998.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful change of Sherry Nelson's work schedule, and within 3 days thereafter, notify her in writing that this has been done and that the schedule change will not be used against her in any way.

(d) Within 14 days of service by the Region, post at its facility in Grand Rapids, Minnesota, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 14, 1998.

[15] We find it unnecessary to decide the supervisory status of the remaining 18 department managers because doing so would not materially affect the Order.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

Dated, Washington, D.C. September 17, 2003

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

I agree with my colleagues in all respects, except for their adoption of the judge's finding that the Respondent violated Sec. 8(a)(3) and (1) by changing the work schedule of Sherry Nelson on October 1, 1998, because of her union activity. Contrary to the judge, I find that the General Counsel has not established that the Respondent knew that Nelson was a union supporter. Therefore, I conclude that the General Counsel failed to establish a prima facie case under *Wright Line*[1] that union activity was a motivating factor behind the decision to change her work schedule.

Sherry Nelson was a sales associate who worked Monday through Friday in the lawn and garden department, from 6 a.m. to 3 p.m. In October 1998, after the organizational campaign commenced, the Respondent changed her hours to 7 a.m. to 4 p.m., Monday through Friday, including some weekend work. The judge found that this change was made in response to Nelson's support for the Union. I disagree.

Nelson was a participant in the organizational campaign at the Respondent's store, but not in a manner that identified her as a union supporter. She passed out union related literature, but this literature did not advocate a position supportive of the Union. It was simply generalized information gathered from the internet and encyclopedias. Nelson distributed it for the purpose of educating her fellow employees about the role that unions play in the work force.

This conduct could not have caused the Respondent to believe that Nelson was a union supporter. In any event, she dispelled any such notion in conversations that she had with store manager Shockley. In one conversation, she told Shockley of her intent to attend a union meeting just "to find out what the [Union] was all about . . . because . . . I wanted to know what I was voting on." Shockley actually encouraged her to go to the meeting and stated that "everybody should go and find out about it and make that decision." In a later conversation, Nelson told Shockley that she was still undecided about the Union and "didn't know one way or another" and that "[s]he just had a lot of questions herself and she was curious."

I conclude from these conversations and from her leafletting activity that Nelson was a "fence-sitter" with respect to supporting the Union and that the Respondent knew that. There is no evidence that Nelson ever changed her neutral view.

The judge found that a particular allegation of the July 30 complaint "unquestionably pertain[s] to Nelson," identifying her as a union supporter. The allegation in question is that Shockley unlawfully solicited grievances from employees by suggesting that they form a group to discuss their problems with individuals from the Respondent's home office in Arkansas. Assuming arguendo that Shockley would infer that the complaint referred to his alleged conversation with Nelson and others, that would not establish that Shockley knew that Nelson was prounion. An employer could solicit antiunion employee to stay that way, neutral employees to be antiunion, and prounion employees to change their minds. As I have shown, Nelson had expressed neutrality to Shockley.

The majority seems to suggest that Nelson's activities indicated a prounion bent, noting that she broached to Shockley the idea of forming a group of employees to meet with the Respondent about employee complaints. I disagree. Where, as here, an employee suggests in the midst of an organizing campaign that employee complaints can be dealt with through nonunion group action, I am inclined to view that employee as one who sees no need for a union.

My colleagues say that it is "undisputed" that Nelson engaged in protected activity and that the Respondent knew of this. This reference can only mean the allegedly protected activity of talking about the Union as a neutral, as distinguished from prounion conduct. My colleagues then make the assertion that the Respondent violated Section 8(a)(3) by changing Nelson's hours in response to her talking about the Union. The main problem with this assertion is that it is not made by the General Counsel. The General Counsel sought to show that Nelson engaged in prounion activity, and was punished therefor. Further the cases cited by my colleagues do not support the proposition that an employer violates Section 8(a)(3)

[1] *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

by taking action against an employee in retaliation for her neutral stance. As stated in *Bay Corrugated Container*, 310 NLRB 450, 451 (1993), the principle of *Dawson Carbide* is that, "in the context of a union organizing drive, the discharge of a neutral employee in order to facilitate or cover up discriminatory conduct against a known union supporter is violative of Section 8(a)(3) and (1) of the Act." As the Sixth Circuit explained, adverse action taken against neutral employees in these situations

> can best be analogized to the issue of liability when innocent employees are laid off in mass with employees discharged for their union activities. In those cases, it is well established that a showing that the Company discharged each employee for union activities is not necessary for finding § 8(a)(1) and (3) violations if the cause of the discharges is anti-union activities.

NLRB v. Rich's Precision Foundry, 667 F.2d 613, 628 (1981).

Thus, the violations found with respect to the neutral employees in *Dawson Carbide* and *Bay Corrugated Container* were not committed, as the majority suggests, in order to encourage neutral employees to oppose the union; rather, the violations were based on the theory that they were innocent "pawns in an unlawful design" (*Dawson Carbide* at 389) directed against others whom the employer knew to have engaged in prounion activity.

Here, however, the General Counsel did not contend, and the judge did not find, that the schedule of neutral employee Nelson was unlawfully changed as part of an unlawful design directed at known union supporters. Accordingly, in the absence of evidence that the Respondent knew that Nelson engaged in prounion activity, *Dawson Carbide* does not support the majority's finding of a violation.

Accordingly, in the absence of evidence that Nelson engaged in any conduct supportive of the Union's position in the organizational campaign, there can be no finding that Respondent knew that she supported the Union. This is a critical element that the General Counsel must prove to sustain a prima facie case under *Wright Line* that the Respondent's decision to change Nelson's work schedule was unlawfully motivated. *Amber Foods, Inc.*, 338 NLRB No. 84, slip op. at 3 (2002); *Webco Industries*, 334 NLRB 608, 609 (2001).

My colleagues seek to distinguish *Amber* and *Webco* on the ground that the General Counsel failed to show in those cases that the employer knew that the employees engaged in any protected activity. By contrast, my colleagues say that the Respondent knew that Nelson engaged in "union talk" activity. However, as discussed above, this theory is not argued by the General Counsel and, in any event, is not supported by the cited cases.

For the reasons set forth above, I find that the General Counsel has failed to establish that the Respondent knew or even suspected that Nelson was a supporter of the Union. Accordingly, I would dismiss the Section 8(a)(3) allegation regarding Nelson.[2]

Dated, Washington, D.C., September 17, 2003

Robert J. Battista, Chairman

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT implement and maintain a broad rule prohibiting employees from discussing their wages and benefits among themselves.

WE WILL NOT tell employees that they are not permitted to discuss their wages and benefits among themselves or threaten to terminate them if they do so.

WE WILL NOT tell our department managers who are not statutory supervisors that they cannot participate in union activities, that it would be unlawful for them to do so, and to report union activity to management.

WE WILL NOT implicitly threaten Deborah Hager or any other employees with termination because of their union activity.

WE WILL NOT change the work schedule of Sherry Nelson or any other employees because of their union activity.

[2] Because I would dismiss this allegation based on the absence of the Respondent's knowledge of Nelson's prounion activities, it is unnecessary to consider the judge's finding of Respondent's animus.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL rescind the rule prohibiting employees from discussing their wages and benefits among themselves.

WE WILL return Sherry Nelson to the schedule she was working prior to October 1, 1998.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful change of Sherry Nelson's work schedule, and WE WILL, within 3 days thereafter, notify her in writing that we have done so and that we will not use the schedule change against her in any way.

WAL-MART STORES, INC.

Karen Nygren Wallin, Esq., for the General Counsel.
Paul J. Zech, Esq., of Minneapolis, Minnesota, for the Respondent.

DECISION

STATEMENT OF THE CASE

C. RICHARD MISERENDINO, Administrative Law Judge. This case was tried in Grand Rapids, Minnesota, on April 26–27, 1999, and in Minneapolis, Minnesota, on May 24, 1999. The United Paperworkers International Union (Union)[1] filed charges and amended charges on March 2, June 12, and July 30, 1998, in Case 18–CA–14757 against Wal-Mart Stores, Inc. (Respondent or Wal-Mart). A complaint was issued on July 30, 1998, alleging that the Respondent violated Section 8(a)(1) of the Act by threatening, interrogating, and soliciting grievances from employees.[2] The Respondent timely filed an answer to the complaint.

On October 5, the Union filed an additional charge against the Respondent in Case 18–CA–15017,[3] which was amended on November 17, 1998, and January 27, 1999. On January 28, 1999, a complaint was issued on this charge alleging that the Respondent violated Section 8(a)(1)(3) and (4) of the Act by threatening employee Shirley Nelson and by discriminatorily changing her scheduled workdays and hours. The Respondent timely filed an answer to this complaint.

Also, on January 28, 1999, an order consolidating the cases and notice of hearing was issued.[4] The parties have been afforded a full opportunity to appear, present evidence, examine and cross-examine witnesses, and file briefs.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation, is a national retailer with a store located in Grand Rapids, Minnesota, where during the year ending December 31, 1998, it purchased and received goods valued in excess of $50,000 directly from points located outside the State of Minnesota and derived gross revenues in excess of $500,000. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent also admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. SECTION 10(B) MOTION TO DISMISS

At the hearing, the General Counsel moved to amend the complaint in Case 18–CA–14757 to add paragraph 5(i) which alleges that since on or about January 1999 the Respondent has unlawfully threatened employees in violation of Section 8(a)(1) of the Act by including the following statement at the bottom of their individualized profit sharing and benefits statement: "This is confidential information for you and your family and should not be shared with other associates/partners." The motion was granted over Respondent's objection. In its brief at page 40, fn. 8, Respondent renewed its objection and moved to dismiss paragraph 5(i) of the complaint on the basis that it is time barred by Section 10(b) of the Act.

The evidence discloses that the allegations in paragraph 5(i) are closely related to the allegations contained in paragraph 5(h) of the complaint. Both paragraphs concern an alleged threat to discipline employees for discussing their wages and benefits in violation of Section 8(a)(1). Paragraph 5(i) involves a written publication, containing an alleged threat, authorized by a management official. Paragraph 5(h) involves an alleged verbal threat made by a manager. Thus, I find that the alleged unlawful conduct in both paragraphs involves the same legal theory, arises from the same sequence of events, and entails the same defense by Respondent. *Reddl, Inc.,* 290 NLRB 1115, 1116 (1988).

Accordingly, I deny the Respondent's renewed motion to dismiss the allegations in paragraph 5(i) of the complaint.

III. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of the Case

In late 1997, the Union sought to organize the Respondent's retail work force, including department managers, at its store in Grand Rapids, Minnesota. The Respondent took the position that the department managers were supervisors within the meaning of Section 2(11) of the Act. At various times and in various meetings, the Respondent's management officials told the department managers that they could not participate in the organizing campaign because they were supervisors and therefore it would be unlawful. Also, the department managers were told to report any union activity to management. Thus, the primary issues in this case are (1) whether the department managers are Section 2(11) supervisors and (2) whether the statements

[1] At the hearing, the Union's name was corrected to reflect a formal name change to Paper and Allied Chemical and Energy Workers International Union (PACE) (Tr. 6, 9).

[2] The complaint was again amended at the hearing to add the name of Store Manager Mike Schockley to subpar. 5(b) and also to add a subpar. 5(i). (Tr. 6, 9–10).

[3] On October 6, an order was issued indefinitely postponing the hearing scheduled in Case 18–CA–14757.

[4] All dates are in 1998, unless otherwise indicated.

made by the Respondent's management officials unlawfully interfered rights protected by Section 7 of the Act.

In the course of the organizing campaign, the Respondent's store manager had several conversations with the employees, individually and in small groups, concerning his views on unions and problems within the store. The store manager also told the employees that they were not allowed to discuss their wages and benefits with each other, and if they did, they could be subject to discipline. Thus, additional issues exist as whether the employees were unlawfully interrogated and threatened and whether the store manager unlawfully solicited grievances from the employees.

Finally, one employee, Shirley Nelson, was particularly visible and vocal in the course of the union campaign. She undertook a very studied approach to learning about unions and the Union and she frequently discussed what she had learned with the other employees and the store manager.

For many years, the posted schedule reflected that Nelson was to work 7 a.m.-4 p.m., during the week, and every other weekend. Instead, and with the approval and concurrence of her department manager and the store manager, she actually worked 6 a.m.- 3 p.m., and no weekends.

In late September 1998, Nelson was subpoenaed to testify in an upcoming Board hearing. Shortly thereafter, a support team manager intimated to Nelson that her schedule arrangement might be in jeopardy and suggested that she get it approved in writing by her department manager. A few hours later, an assistant department manager informed Nelson that effective immediately she was to work 7 a.m.-4 p.m., and every other weekend in accordance with the posted schedule. Thus, there is an issue of whether the support team manager threatened Nelson by implying that her schedule was under close scrutiny and whether her schedule was changed because she was about to testify at a Board hearing and/or because of her union activity.

B. Case 18–CA–14717

1. Background

Wal-Mart Stores, Inc. is the largest retailer in the United States with headquarters in Bentonville, Arkansas. In 1990, it opened Wal-Mart Store 1609 in Grand Rapids, Minnesota. In February 1998, Store Manager (SM) Mike Shockley was directly responsible for the operations of Store 1609.[5] Reporting to him were three assistant store managers (ASM): Mark Sayre, Jeff Breth, and Rachelle Branstrom.[6] All of these positions are salaried.

Store 1609 (Store) has a personnel manager (PM), Barb Sunell, who interviews applicants, trains employees, oversees employee benefits, maintains personnel and training records, and assists the ASMs and the SM. There are eight support team managers (STM) in store 1609, who actually perform two jobs. They are primarily responsible for certain positions in the Store[7] and secondarily responsible as backups to the ASMs, as needed. STM's can open and close the store if asked to do so by the SM and ASMs, staff the customer courtesy desk, and make bank deposits. The PM and STMs are paid on an hourly basis.

The store has approximately 33 separate merchandising areas divided into 23 departments, which are divided into three groups, with one ASM responsible for each group on a rotating basis. Certain departments, such as shoes, jewelry, pharmacy, and snack bar, are called speciality divisions. They rent space in the store, maintain their own profit-and-loss statements, budget and payroll, and report to separate district managers (i.e., they are not overseen by DM Morey).

All departments, including speciality departments, have a department manager (DPM) and in some cases the DPM oversees more than one merchandising area. The DPMs are paid on an hourly basis and work primarily during the day, Monday through Friday. The departments are staffed by hourly paid sales associates (SA), who work days, evenings, and weekends. Specialty sales associates are subject to the same terms and conditions of employment as all other sales associates. The remainder of the store's work force is comprised of customer service managers and cashiers at the front of the store, greeters, unloaders, soft or hardlines processors (stockers) who work the store during the day, overnight stockers, office support staff, and maintenance.

2. The Wal-Mart approaches

Wal-Mart utilizes various approaches to facilitate the operation of the Store and to improve performance. One such approach is called a store within a store (SWAS). SWAS was designed to encourage the DPMs to take responsibility for running their respective departments. The DPMs are allowed to review sales figures, lower prices to be competitive, and adjust their inventories as needed. DPMs can also review weekly SWAS computer printouts to track merchandise and sales.

DPMs are also encouraged to utilize two other approaches to improve employee performance. The first, "coaching for success" (or "coaching by walking around"), is an informal ongoing process which seeks to give the employee instructional guidance and feedback on the sales floor. The second approach is "coaching for improvement", a formal disciplinary process, which is used when "coaching for success is unsuccessful. There are five levels of "coaching for improvement": verbal coaching, first written coaching, second written coaching, decision making coaching/final written coaching, and termination.

Finally, certain computer based learning (CBL) modules are available to the DPMs. These training modules provide an overview of topics such as recruiting the best, delegation, coaching for improvement, diversity awareness, performance reviews, and team building. These courses are not available to sales associates and stockers.

[5] Schockley reported to District Manager (DM) Robert Morey, who oversaw the merchandising operations of Store 1609 and eight other Wal-Mart stores in the area.

[6] Sayre was transferred to another Wal-Mart store in the summer 1998. He was replaced by ASM Elizabeth Iallonardo.

[7] In 1998, the primary positions held by the STMs were stocker, unloader, sales associate, department manager, overnight receiving manager, and personnel manager.

3. Department managers' responsibilities

The job description for DPMs discloses that their responsibilities include involvement with planning, assigning and directing work, appraising performance, rewarding and coaching sales associates, and addressing complaints and resolving problems. The document also specifies that DPMs "assist Management with Stocker's performance reviews, coaching and commendations." (Jt. Exh's. 5, 85, 89, 90, and 94.)

a. Interviewing and hiring

The Respondent has a five-step interview process, which originates with PM Sunell. At step one, Sunell screens the prospective employee. At step two, a member of the interview screening committee interviews the applicant.[8] At step three, the applicant completes a standardized personality survey, the results of which are discussed with an ASM or the SM at step four. The last step is a drug test. Sunell testified that the process could end at any step, except the drug test. If an applicant passes the drug test, they are hired. (Tr. 451.)

DPMs who participate in the interview process make recommendations, which sometimes are followed. PM Sunell testified that DPMs do not have the authority to hire or fire sales associates, only the SM has that authority. (Tr. 463, 465.) She also testified that an applicant may or may not be hired, even though a DPM has recommended them for hire. (Tr. 452.) DPM Heidi Johnson, who was on the interview screening committee in 1998, stated that she although she made recommendations as to whether an applicant should be hired, the final decision rested with "management." (Tr. 481–482.)

Not all DPMs have participated in the interview process and DPMs do not necessarily interview applicants for openings in their respective departments. DPM Carol Riendeau (hardware and paint) testified that she was involved with the interview of only one applicant in the 4 years she has been a DPM. (Tr. 156–157). Riendeau, and DPMs Simmonette (shoes) and Camilli (sporting goods) testified that applicants have been hired for their departments that they never interviewed, and never met, until Sunell brought them to the department. (Tr. 107, 157, 593.)

b. Discipline

DPMs have not been uniformly involved with the disciplinary process. More notably, for those who have used the process, their involvement has not extended beyond the second level, i.e., the first written coaching. DPM Burt testified that, after verbal coaching failed, she issued a first written coaching to a pharmacy employee for punching out early. (Tr. 386–388.) The disciplinary form was countersigned by the chief pharmacist. (R. Exh. 9, p. 273.) DPM Heidi Johnson testified that she gave a first written warning to a jewelry department associate for leaving merchandise in an unsecure location. (Tr. 486.) While she can initiate verbal coaching on her own (level one), she must touch base with the SM or specialty DM before initiating a written coaching. (Tr. 487.) DPM Riendeau testified that after an unsuccessful attempt at verbally coaching a hardware associate for abusing sick leave, ASM Mark Sayer gave the associate the first written coaching. Although Riendeau did not complete the disciplinary form, she was present when the ASM reviewed it with the sales associate. (Tr. 154.)

DPM Mindy Simonette is the only DPM to testify about an attempt to terminate an associate. She testified that, after conferring with specialty DM Bast, she gave a sales associate a first written warning for poor performance. When the associate failed to improve, Simonette recommended to Bast that the associate be terminated. Bast told her to prepare the termination papers. ASM Branstrom, however, countermanded that directive, telling Simonette that she was not allowed to make that decision. (Tr. 110.) After Simonette conveyed Branstrom's comments to Bast, the associate still was not terminated. Instead, he was transferred to a cashier position in the front end. In another instance, ASM Branstrom allowed Simonette to sit-in on the exit interview of a shoe associate, who was being terminated. Branstrom conducted the interview, Simonette observed. (Tr. 111–112.) Afterwards, SM Shockley told Branstrom that Simonette should not have been allowed to sit-in.[9]

c. Performance evaluations

The Respondent has a written policy procedure for conducting associate performance evaluations. The PM alerts the ASM/immediate supervisor that an evaluation is due, the ASM/immediate supervisor completes and conducts the evaluation, the SM reviews the evaluation, approves or denies any recommended increase, signs the evaluation, and gives it to the PM. The PM keys the evaluation rating into the computer and files the evaluation. (R. Exh. 12, p. 309.) Although the policy specifically defines the respective responsibilities of the PM, ASM, and SM, there is no defined role for a DPM. Rather, the written procedures state that the ASM should check with the DPM and/or immediate supervisor before conducting the evaluation.

Evaluation ratings are used to determine pay raises. An outstanding rating warrants a 6-percent raise; above-standard rating warrants a 5-percent raise; a standard rating a 4-percent raise; and a below standard rating warrants no raise.[10]

SM Shockley testified that some DPMs have done performance evaluations and, of those, sometimes the DPMs are involved in determining the ratings. (Tr. 307, 309.) Shockley added, however, that the ASM has ultimate responsibility for getting evaluations done. (Tr. 370.) He also explained that sometimes ASMs delegate the responsibility for completing

[8] Sunell testified that the interview screening committee is comprised of five employees selected by management. (Tr. 455.) In 1998, the committee members were Kim Shannon (invoice clerk) and Laurie Bonham (claims clerk) both office support staff and DPMs Heidi Johnson (jewelry), Amy Martyre, and Danita Camilla (automotive).

[9] In the summer 1998, SM Shockley terminated two lawn and garden associates without the knowledge of lawn and garden DPM Shirley Heaton. When Heaton found out about the terminations the next day, she expressed her dissatisfaction to Shockley because she was not involved in the decision.

[10] In addition to pay raises tied to performance evaluations, a sales associate can receive a merit pay increase. Merit increases have to be approved first by the SM or in the case of a specialty department, the specialty DM and the SM. (Tr. 501.) Some DPMs have successfully recommended merit pay increases for sales associates.

evaluations to the DPMs. In the pharmacy, a specialty department, DPM Anna Burt testified that she regularly does the evaluations for the associates in her department. She also testified that the chief pharmacist must sign the evaluation form and that he has the final say. Burt added, however, that he seldom, if ever, has disagreed with her assessment. In contrast, DPM Riendeau (paints/hardware) testified that although ASMs have asked her to evaluate the strengths and weaknesses of sales associates, she turned the information over to the ASM, who completed the evaluation form. Riendeau stated that she has never determined the rating for an associate, has never been advised afterwards of the final ratings, and does not know when a raise is given. She also has not participated in an evaluation conference.

d. Assigning tasks

DPMs assign tasks on a daily basis to sales associates. In the smaller departments (pets, toys, stationary, softlines, health & beauty, chemicals/paper/furniture), the DPMs work primarily alone during the day. (Tr. 149, 190.) They may leave written instructions (a "to-do" list) for the evening department associate(s) or store floater associate(s) assigned to that department. (Tr. 152, 190.) If the evening associate does not complete the listed tasks, the DPM may work on them the next day or an associate may work on it again the following evening. In the pharmacy, a speciality department, DPM Burt testified that there were approximately six associates in her department in 1998, who she delegated work to depending on what displays needed attention and who was available to work the counter. In a larger department, like lawn & garden, which had approximately 15 associates in 1998, DPM Shirley Heaton testified that she directs the daily work of associates and makes assignments based on individual staff members' strengths and schedules. (Tr. 545.) In most cases, regardless of the department, the DPM performs many of the same work tasks as the associates, often working along side of them. Sporting Goods DPM Danita Camilla testified that in 1998 there were seven associates in her department. She nevertheless unloaded freight and stocked shelves like the sales associates. She also delegated these tasks to associates based on their capabilities and experience.

e. Scheduling

In nonspecialty departments, large and small, the scheduling of sales associates is accomplished by a computer program called preferred scheduling. The schedule is usually generated about 3 weeks in advance of the week to be worked and the printed schedule is posted by the breakroom. In some departments (e.g., lawn and garden, and sporting goods), the DPMs have adjusted associate schedules to meet department scheduling needs, even though SM Shockley testified that upper management approval is required before doing so. (Tr. 348.)[11] DPMs have borrowed associates from other departments with the concurrence of the other DPM to fill scheduling needs and can lend out associates to other departments for the same reason. Sporting Goods DPM Camilla testified that there have been times when she has sent home associates for lack of work and that she does not need upper management's approval to do so.

In the pharmacy, a specialty department, DPM Burt testified that the chief pharmacist gives her the numbers she needs to manage the staff and the gross hours available. She works up a schedule from that. She has to make sure that the department is covered, and at the same time stay within budget. If the department needs extra staff, she needs the approval of the specialty DM or she sometimes asks the PM to find help from another department. DPM Burt testified that associates used to contact her when they called in sick, but recently her specialty DM told her that the associates needed to contact the PM. In the jewelry department, DPM Heidi Johnson testified that she and her specialty DM determine how many man-hours are needed to staff the department depending on the projected increase in sales versus the hourly wages of the associates. Together they set the staffing policy, but she works out the actual schedule.

Lawn and Garden DPM Sherry Heaton testified that if she needs help in her department she could arrange with another DPM to borrow an associate and upper management would not be involved, so long as extra staff time was not required. If someone calls-in sick, Heaton has the option of borrowing from another department or calling-in a lawn and garden associate. Similarly, Sporting Goods DPM Danita Camilla testified that although associates are scheduled by computer, she could rearrange the schedule to get coverage, by asking associates to change shifts or by borrowing associates from another department after asking the associate and the respective DPM. She does not need prior approval from an ASM.

4. The organizing campaign

In late 1997, the Union sought to organize the retail work force at Store 1609, including the DPMs. Employee Deb Hager initiated the organizing drive by contacting the Union. She talked to coworkers about joining the Union, enlisted their help, and solicited signatures on union authorization cards. At least four DPMs signed authorization cards.

In January 1998, ASM Mark Sayre became aware that some employees had signed union authorization cards. He phoned the Respondent's union hotline to report the occurrence. That triggered a phone call from Mark Shafer in corporate headquarters to DM Morey. Shafer told Morey that he and some other corporate officials would arrive in Grand Rapids that weekend to assess the situation. The next day, Friday, SM Shockley spoke with Morey, who advised him to remain calm and wait for corporate assistance. Two days later, Sunday, Shafer along with two other corporate officials, met with Morey, Shockley, and the three ASMs to plan a strategy. A special meeting of all stores personnel above the sales associate level was arranged for the following day at a nearby motel.

The next day, Monday, a special meeting was held at the Rainbow Inn attended by Shafer, his corporate staff, Morey, Shockley, the three ASMs, PM Sunell, all the STMs, and all the DPMs. Morey had heard rumors that some DPMs were involved in the union organizing campaign. He, along with Shafer, told the DPMs that they could not participate in the union activity because they were supervisors. If they went to

[11] At another point in the hearing, SM Shockley testified that DPMs can change schedule without prior approval. (Tr. 370.)

union meetings they would be breaking the law. Morey also told the DPMs that they should report any union activity.

Later the same day, at a regular daily meeting, Shockley told the sales associates that a union was attempting to organize the employees and that the Store did not need a union. For the next week or so, various personnel from the corporate office visited the Store daily, greeting employees, watching them work, and generally acting overly friendly.

In the weeks following the Rainbow Inn meeting, Shockley and the ASMs reinforced the idea that DPMs could not participate in union activities. DPM Simmonette testified that ASM Branstrom told her that she was a supervisor and could not vote for a union. (Tr. 112.) DPM Danny Dome stated that after the Rainbow Inn meeting, he told ASM Mark Sayre that he wanted to hear both sides of the argument, but Sayre told him that if he went to a union meeting he would be violating federal law. (Tr. 187.) A short time later, on February 3, Dome attended a DPM meeting led by DM Morey, who reiterated that if a DPM heard of any union activity they should report it. (Tr. 188.) DPM Riendeau recalled attending small group meetings in mid-February 1998, where Shockley explained his opposition to the Union. When Riendeau stated her desire to go to a union meeting to hear the other side of the story, Shockley told her she could not go to union meetings. (Tr. 168–169.) According to Riendeau, she then asked Shockley if the employees could take a group complaint to corporate headquarters. Shockley dismissed the idea out-of-hand.

5. Sherry Nelson's involvement with the union

Sales Associate Sherry Nelson quickly became involved in the union organizing campaign. She attended union meetings and distributed literature to other employees, including DPMs. She researched information about unions on the internet and discussed her findings with store personnel, including SM Shockley.

On one occasion, Nelson told Shockley that she was going to encourage other employees, and some DPMs, to attend the union meetings. Shockley told it was all right for sales associates to attend, but DPMs were supervisors and therefore they could not get involved. (Tr. 214.)

Nelson testified that during one of her conversations with Shockley about the Union, he told her that he could not understand the need for a union because the complaints that he had heard about were pretty petty. (Tr. 215.) Nelson stated that she disagreed, and pointed out to him that the complaints were serious and could not be handled at the store level. She further testified that at that point Shockley suggested that she organize a panel to go to corporate headquarters in Bentonville, Arkansas or have some corporate representatives visit the store. When she asked Shockley about the employee panel a few days later, he told her it would not be possible. (Tr. 216.) In contrast, Shockley testified that the idea of going to the corporate offices was Nelson's idea. He denied having told Nelson to organize a panel. For demeanor reasons, I credit Shockley's testimony on this issue.

C. Case 18–CA–15017

For years, Nelson had worked 6 a.m.-3 p.m., in the lawn and garden department with the consent of her DPM, Shirley Heaton, even though the official computer generated schedule showed her as working 7 a.m.-4 p.m. On or about September 24, 1998, Nelson received a subpoena to testify in a Board hearing.

On Thursday, October 1, STM Vicki Johnson and Nelson were talking in the break room. When Johnson asked Nelson about her 6 a.m.-3 p.m. schedule, Nelson told her that it had been approved by SM Shockley. According to Nelson, Johnson then suggested that she might want to get the approval confirmed in writing.

A few hours later, ASM Branstrom questioned Nelson about her hours and informed her that starting immediately she must be begin working 7 a.m.-4 p.m. in accordance with the computer generated schedule. It also meant that Nelson had to work the upcoming weekend. Nelson immediately complained to her DPM Heaton, pointing out that she had tickets for a concert on the weekend. Although Heaton found a substitute to work for Nelson over the weekend, she told Nelson that the matter was out of her hands. Nelson began working her new hours the following Monday.

When Nelson reported to work at 7 a.m. on Monday, she noticed that Stocker Robbie Bartick was performing the duties that she normally performed at 6 a.m. in the lawn and garden department. Upon further inquiry, Nelson learned that Bartick's new assignment was to unload freight in the lawn and garden department starting at 6 a.m. Although Nelson complained to Heaton, Shockley and Morey about the change in hours, nothing was done about it.

IV. ANALYSIS AND FINDINGS

A. The Supervisory Issue

Section 2(11) of the Act defines a supervisor as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a routine or clerical nature, but requires the use of independent judgement.

The statutory language is disjunctive, and the exercise of any one of the listed indicium is sufficient to find that an individual is a supervisor. *Energy Systems & Services*, 328 NLRB 902 (1999). The duties must be exercised with independent judgment on behalf of management and not in a routine manner. *Masterform Tool Co.*, 327 NLRB 1071 (1999). The Board does not construe supervisory status too broadly because the employee who is deemed a supervisor loses his protections under the Act. *Tree-Free Fiber Co.*, 328 NLRB 389 (1999). Finally, the burden of proving supervisory status is on the party asserting that such status exists. *Chevron U.S.A.*, 309 NLRB 59, 62 (1992).

1. Hiring

The evidence discloses that DPMs do not have the authority to hire or fire employees. (Tr. 463, 465.) Those decisions are made by the SM. As for hiring, DPMs have limited involvement in the interview process. At best, a DPM may participate as one of five members on the interview screening committee. Under that arrangement sometimes their recommendations as a member of the screening committee have been followed; sometimes they have not. Often the DPM on the interview screening committee interviews an applicant for a position in an unspecified department or a department other than the DPM's department. Indeed, sometimes DPMs are not involved at all in interviewing applicants for their departments. Riendeau, Simmonette, and Camilli all testified that applicants have been hired for their department that they met for the first time when PM Sunell brought them to the department

2. Firing

As for firing, DPMs play no role in firing employees. DPM Simonette testified that she once recommended to her speciality DM that a marginally productive employee be terminated. Although he concurred and instructed her to prepare the necessary paperwork, ASM Branstrom told her she was not allowed to make that decision. The associate was not terminated, but was transferred to another department. In another instance, ASM Branstrom allowed Simonette to sit-in on the exit interview of a sales associate who was being terminated. Afterward, SM Shockley told Branstrom that Simonette should not have been allowed to sit-in either. Lawn and Garden DPM Heaton had no involvement in the firing of two associates in her department by SM Shockley. She was irked that he took such action without consulting her and without considering whether they should have been coached or given a first written warning.

3. Discipline

The DPMs involvement in the disciplinary process ("coaching for improvement")[12] is equally circumscribed and widely varied between departments. While the evidence shows that some DPM's have verbally coached employees, only a few have issued a first written warning (the second step of the Respondent's five step disciplinary process). In those few instances, they first had to obtain the approval of upper management before proceeding. DPM Burt testified that she needed to get the chief pharmacist to countersign her form (R. Exh. 9, p. 273) and DPM Johnson testified that she must touch base with the SM or speciality DM before initiating a written coaching. Most revealing is the lack of evidence showing involvement by a DPM beyond the first written warning phase.

4. Evaluations

With respect to performance evaluations, the Respondent has a written policy, which specifically defines the respective responsibilities of the PM, ASMs, and SM, but does not define a specific role for a DPM. Shockley testified that ASMs are ultimately responsible for getting evaluations done and that they sometimes delegate that responsibility to a DPM. His sometimes delegate that responsibility to a DPM. His testimony that "some" DPMs have done performance evaluations and that "sometimes" they are involved in determining ratings is revealing. The evidence shows that no DPM, acting alone, has the authority to evaluate a sales associate. All require the countersignature of upper management somewhere along the line. Even though DPM Burt testified that she regularly does the evaluations for associates in her department and that her assessments are seldom disturbed, she conceded that the chief pharmacist must countersign the form because he has the final say. DPM Riendeau testified that while she has provided information evaluating the strengths and weaknesses of sales associates to ASMs, the ASMs complete the form. She does not determine the rating nor even know what it is. Thus, the evidence shows that some DPMs have had some input in the evaluation process and that sometimes they are involved in determining ratings.

5. Scheduling

The undisputed evidence shows that scheduling is done largely by computer 3 weeks in advance. Although the DPMs have some flexibility, after the computer schedule is posted, to borrow and lend sales associates to meet workflow peaks and valleys and to fill-in gaps, their ability to do so is limited.[13]

At one point, SM Shockley testified that the DPMs cannot adjust the computer schedule by themselves, but must obtain approval of upper management. (Tr. 348.) He later contradicted himself by testifying that DPMs can change the schedule without obtaining higher approval, referring to DPM Shirley Heaton to illustrate the point. (Tr. 370.) But Heaton testified that she lost control of scheduling in April 1998. (Tr. 550, 566.) The limitations imposed on Heaton's authority to alter the computer schedule are illustrated by the events surrounding the rescheduling of Sherry Nelson. For years, Nelson worked from 6 a.m.-3 p.m., with Heaton's consent, encouragement, and approval, even thought the computer schedule reflected her hours as 7 a.m.-4 p.m. Then, in late September 1998, Nelson's hours were changed by store management without Heaton's knowledge or consent. Although Heaton admittedly was upset, she told Nelson that the matter was out of her hands. Thus, the evidence supports a reasonable inference that the DPMs have had much less latitude to alter schedules since April 1998.[14]

[12] Most DPMs take part in "coaching for success," which precedes the disciplinary stage of Coaching for Improvement.

[13] The undisputed evidence discloses that DPMs have absolutely no authority to issue or approve overtime. Shockley testified that he seldom approves overtime because it is a reflection of poor management.

[14] The evidence shows, however, that in the pharmacy department (a specialty department), the chief pharmacist gives the DPM the gross number of hours that she can schedule in accordance with the department's budget. She then sets the schedule within the parameters set by the chief pharmacist, subject to his approval. (Tr. 380, 390.) In another specialty department (jewelry), the evidence shows that the DPM, along with her DM, sets staffing policy by which the DPM then schedules the sales associates. (Tr. 480.) Thus, even in a specialty department where the DPM has greater latitude to schedule sales associates, the scheduling must be done within set parameters subject to approval by higher management.

6. Task direction

Although DPMs provide direction to the sales associates and assign them tasks to do, these are routine decisions, which do not involve the exercise of independent judgment. The "to-do" lists are a good example of the type of directions given by the DPMs. The lists reflect instructions such as "leave inside end cap empty for tide—on tonites trucks, and Dept. #17 work in any furniture that will go-neatly and right side up!" (R.Exh. 13(a).) Also, "the blacks on the tables need to be done tonight Amy and I did the 3 tables by the Halloween stuff and the 3 tables by men's wear . . . wipe down all cupboards. Amy and I did insides." (R. Exh. 9.) In the lawn and garden department, DPM Shirley Heaton wrote down the delegation of duties by shifts, i.e., "8–5 shift-stocking inside; 9-6 shift-parking lot, stock inside. Dusting displays; . . . closing shift-Bagged goods area, stocking inside. Closing Card." The instructions also state "[t]his is an outline of what's expected on you every day. You will have additional projects each day on top of these, such as; unloading trucks, merchandising plants, and etc." (R. Exh. 10, p. 279.) The credible evidence discloses that sometimes these instructions are carried out, sometimes they are not, but more often than not, the DPM completes the tasks or part of the task the next day. Thus, I find that it is not the level of decision making that would warrant a finding of supervisory status.

7. Training

The CBL training modules that the DPMs attend before or during their tenure as DPM, provide a basic overview of various functions that the DPM may participate in, but do not alter the DPM's actual involvement as described above. If anything, some of the CBL underscore the limited involvement, input, and discretion that DPMs have in areas germane to determining supervisory status. For example, the Respondent on brief at page 30 partially cites an excerpt from the Food Service Dept. Mgr. Overview Lesson for the proposition that it confers upon the DPM the authority to effectively recommend hiring. A review of the complete citation (Jt. Exh. 2, p. 316) however, suggests just the opposite.

> Store Management does the interviewing and hiring of the Food Service associates. They follow the same guidelines used in hiring Associates for other departments in the store. Some Managers *may* ask you to sit in on the interview, or to actually perform the interview. Some Managers *may* allow you to do your own interviewing and hiring. Participating in the interview allows you to be included in the decision of who is hired for your department and gives you the opportunity to choose the type of person you need to service your Customer. [Emphasis added.]

This excerpt, relied upon by the Respondent, falls short of establishing that DPMs have the authority to, and effectively do, recommend hiring. It is also inconsistent with record evidence reflecting their actual involvement, or lack thereof, in that process. Thus, the fact that DPMs are required at some point to attend these CBL training modules does not confer upon them supervisory status.[15]

In sum, the evidence discloses that the DPMs do not exercise their responsibility with independent judgment or perform such duties that would confer supervisory status. Accordingly, I find that the DPMs are not supervisors within the meaning of Section 2(11) of the Act.

B. Case 18–CA–14757:ULPs

1. Unlawfully prohibiting the discussion of wages

SM Shockley testified that the Respondent once had a formal policy forbidding associates from discussing wages, which was eliminated 5 years ago. (Tr. 279.) The credible evidence shows, however, that in a benefits and compensation statement issued on or about January 1, 1999, the Respondent told employees in writing that the contents therein was confidential information and should not be shared with other associates. (GC Exh. 2.) Thus, the evidence supports a reasonable inference that the policy exists today.

In addition, DPM Riendeau testified that Shockley told her that talking about wages was not allowed by the Respondent and that it could be grounds for termination. Although Shockley admitted that he told associates not to discuss their wages with each other, he denied that he told them that it could or would result in discipline. His testimony is unpersuasive. Three current sales associates, Virginia Pittack, Deb Hager, and Barb Hueston, corroborated Riendeau's testimony and I find that their testimony is apt to be particularly reliable. (Tr. 28, 80, 50.) *Farris Fashions*, 312 NLRB 547, 554 (1993), enfd. 32 F. 3d 373 (8th Cir. 1994). For this, and demeanor reasons, I credit the testimony of Riendeau that Shockley threatened disciplinary action if the sales associates discussed their wages.

Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act by telling employees that they were not allowed to discuss wages and benefits and that they could be terminated for doing so as alleged in paragraph 5(h) of the complaint in Case 18–CA–14757. *Main Street Terrace Care Center*, 327 NLRB 522, 525 (1999).

With respect to the allegations in paragraph 5(i) of the complaint, I find that while the sentence contained in the wage and benefit statement does not constitute a threat, it does unlawfully interfere with the Section 7 rights of the employees. *Franklin Iron & Metal Corp.*, 315 NLRB 819 (1994); *Independent Stations Co.*, 284 NLRB 394, 396 (1987). Accordingly, I find that the Respondent has violated Section 8(a)(1) of the Act by maintaining a rule prohibiting the discussion of wages and benefits.

2. Unlawfully restricting DPMs from participating in union organizing activity

The undisputed evidence shows that DM Morey, as well as ASMs Sayre and Breths told the DPMs that they could not

[15] Nor does the fact that DPMs are paid 50 cents more than sales associates confer supervisory status. Pay differential is a secondary indicia of supervisory status and, in the absence of primary indicia of supervisory status as enumerated in Sec. 2(11), is insufficient to establish supervisory status. *Masterform Tool Co.*, 327 NLRB 1071, 1072 (1999).

participate in union activities and that it would be unlawful for them to do so. In addition, DM Morey testified that he told DPMs to report union activity. DPM Dome testified that DM Morey also told the DPMs to break up conversations about the Union between employees, but Morey denied doing so. (Tr. 532.) For demeanor reasons, I credit Morey's testimony that he did not instruct the DPMs to break up conversations.[16]

I nevertheless find that by telling the DPMs that they were not allowed to participate in union activity and that they should report union activity to management, the Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 5(a), 5(b), and 5(c) of the complaint.

3. Alleged threats by corporate office staff

DPM Danny Dome testified that at the morning meeting at the Rainbow Inn on or about February 2, 1998, someone unfamiliar to him from the corporate offices spoke to the DPMs about the Union's organizing drive. The unidentified speaker stated that unions had tried without success to organize Wal-Mart before and while he did not know much about this Union, Wal-Mart usually won their cases. The General Counsel argues that these statements constitute a threat concerning the futility of organizing or bargaining. I disagree. I do not infer a threat from the statement. Rather, I find that the statement expressed a view and opinion protected by Section 8(c) of the Act. I therefore shall recommend that the allegations of paragraph 5(d) of the complaint be dismissed.

4. Alleged solicitation of grievances by SM Shockley

DPM Riendeau testified that in mid-February 1998, she attended a small group meeting held by SM Shockley during which he expressed his opposition to the Union. She further testified that in the course of the meeting, she asked Shockley if the employees could take a group complaint to corporate headquarters in the form of a grass roots type process.[17] (Tr. 167, 171). Riendeau stated that when she recommended that a panel go to corporate headquarters, Shockley dismissed the idea.

In contrast, Nelson testified that in one of the many conversations that she initiated with Shockley about the Union, she told him that the employees' complaints were serious and that they could not be handled at the store level because he, Shockley, had no control over them. According to Nelson, Shockley suggested organizing a panel to go to corporate headquarters or having some corporate representative visit the store. (Tr. 215.) Shockley, however, denied that he suggested organizing an employee panel. Rather, he testified that Nelson suggested taking a group of associates to the home office to get information and that all he did was point out that a grass roots was coming up soon. He also denied initiating the idea of a panel going to the corporate headquarters. (Tr. 272–274.) I credit Shockley's version of the conversation and how it occurred. His testimony that Nelson viewed the trip to corporate headquarters as another way to obtain information is consistent with her own testimony that she was intent on obtaining both sides of the story through research and speaking to other people. Moreover, the evidence shows that the topic of a panel going to corporate headquarters came up within the context of one of Nelson's many informal discussions with Shockley about unions. There is no evidence that Shockley initiated the conversation or that he solicited Nelson for complaints.

Accordingly, I shall recommend the dismissal of the allegations in paragraph 5(e) of the complaint.

5. alleged directive to avoid associating with employees who supported the Union

Paragraph 5(f) of the complaint alleges that STM Vicky Johnson informed employees that management had instructed her not to associate with certain employees because of their support for the Union. Vicky Johnson denied the allegation. For demeanor reasons, I credit her denial. In addition, the General Counsel, who did not produce any credible evidence to support the allegation or rebut Johnson's denial, indicated in her brief at page 41, footnote 19, that she was withdrawing the allegation. Accordingly, I shall recommend the dismissal of the allegation contained in paragraph 5(f) of the complaint.

6. Alleged interrogation concerning union support and the threat of firing

Paragraph 5(g) alleges that SM Shockley interrogated employees regarding their support for the Union and told them that the home office thought that they should be fired because of their union support. On brief, the General Counsel argues that during a performance evaluation in February-March 1998, Shockley unlawfully questioned Sales Associate Deb Hager about her union support. The evidence shows that Hager was a known, active union supporter. She was the employee who contacted the Union to start the organizing drive. The evidence also shows that Hager received an above standard rating and an above average pay increase. Hager testified that she asked Shockley if the rating and pay increase had anything to do with the Union and he said, No. (Tr. 69–70.) She also testified that Shockley told her that he took the organizing drive personally and so did ASM Branstrom. (Tr. 71.)

Hager also testified that she told Shockley that when the persons from corporate headquarters recently visited the Store, she attempted to discuss the Union with them, but they did not respond. (Tr. 73.) She then asked Shockly why they would not discuss the Union with her. Shockley responded that they had asked him to do so, but he declined. (Tr. 75.) He also commented that they questioned why he had not fired her for her union activity. Shockley purportedly told them that he did not want to fire her because she was a good worker. Hager testified that at that point Shockley asked her why she thought the Union would be good for Wal-Mart, but as she began to answer he changed the subject. (Tr. 75.)

This evidence does not establish a violation of the Act. Rather, it shows that Hager initiated and continued the conver-

[16] I therefore shall recommend that the allegation in par. 5(c) of the complaint concerning the alleged instruction by DM Morey to break up conversation between two or more employees be dismissed.

[17] The evidence shows that the Respondent conducts an annual process called "grass roots" which allows associates to express their concerns and complaints. The associates complete a confidential survey, the results of which are tallied, and a small group of employees gets together to discuss problems and how to resolve them.

sation about the Union and that she asked questions of Shockley. Eventually he inquired why she thought the Union would be good for the Store, but before she could answer the question, he changed the subject and did not pursue the topic further. The nature of the question was open, general, and nonthreatening. *Sunnyvale Medical Clinic*, 277 NLRB 1217–1218 (1985). Accordingly, I find that the Respondent did not unlawfully interrogate Hager as alleged in paragraph 5(g) of the complaint and therefore I shall recommend the dismissal of the interrogation allegations.

On the other hand, I find that Shockley implicitly threatened Hager by telling her that upper management had asked him to talk to her about the Union and then inquired as to why he had not fired her for union activity.[18] I find that his comment unlawfully implied that she could be fired because of her union activity. Accordingly, I find that the Shockley unlawfully threatened Debra Hager in violation of Section 8(a)(1) of the Act as alleged in paragraph 5(g) of the complaint.

C. Case 18–CA–15017

1. Evidence of an unlawfully motivated schedule change

The allegations of the complaint in Case 18–CA–15017 pertain solely to the October 1, 1998, schedule change of sales associate Shirley Nelson.[19] The undisputed evidence shows that Nelson was a union supporter, known as such to the Respondent, and that the Respondent was opposed to the Union. Indeed, SM Shockley explained to Nelson and other employees that he opposed the Union and could not understand why the employees wanted to organize. Thus, in addition to protected union activity and knowledge thereof, evidence of animus exists.

The evidence also shows that Nelson was treated differently than other employees. Nelson's actual work schedule of 6 a.m.-3 p.m. had been approved by her DPM, Shirley Heaton, because they worked well together (Tr. 546). It was also approved by SM Shockley. Her schedule nevertheless was changed in order to adhere to the computer-generated schedule, while other employees for personal reasons continued working schedules, which deviated from the computer schedule. For example, Robbie Bartick, who immediately assumed Nelson's duties of sorting freight at 6 a.m., was scheduled by the computer to work 8 a.m.-5 p.m., but actually worked 6 a.m.-3 p.m. in order to transport her son and pick up her mail at the post office before it closed. (Tr. 649, 654.) Likewise, DPM Riendeau was scheduled by the computer to work 7 a.m.-4 p.m., but actually worked 6 a.m.-3 p.m. in order to accommodate her personal schedule. Thus, even though Bartick and Riendeau were not working the posted schedule for nonbusiness related reasons, their schedules were not changed to conform to the computer schedule.

Nor does the evidence show that any other employee had their schedules changed around the same time. Although DM Morey testified that the scheduling was changed storewide, Shockley was could not state who, if any, or how many, other sales associates had their schedules changed. (Tr. 340–341.) While Branstrom testified that in the health & beauty department, she rescheduled some employees to provide coverage early and late in the day (Tr. 618), she did not explain whether their actual work schedules were at variance with the computer schedule.

The timing of the decision to change Nelson's schedule also supports an inference that the change was unlawfully motivated. On July 30, 1998, Shockley received a copy of the complaint in Case 18–CA–14757, which specified a hearing date of October 13, 1998. (Tr. 343.) Although her name was not specifically mentioned in the complaint, the allegations contained in paragraph 6(c) unquestionably pertain to Nelson. Shockley testified that in late July–early August, he and the other managers discussed changing Nelson's schedule. (Tr. 339.) He and ASM Branstrom also testified that sales associates and DPMs had long complained about Nelson's schedule. Neither explained, however, why no change was made until after a complaint was issued. Thus, the timing of the decision to reschedule Nelson further supports a reasonable inference that the decision to change Nelson's schedule was unlawfully motivated.

Accordingly, I find that the General Counsel has satisfied her initial evidentiary burden under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The burden now shifts to the Respondent to show that it had legitimate nondiscriminatory reasons for changing Nelson's schedule or that it would have changed her schedule even in the absence of her union activity.

2. The pretextual reasons for the change

The Respondent preliminary argues that Bartick's stocker position was different from Nelson's sales association position in that the former was responsible for placing merchandise on the shelf, while the latter performed that function, but also assisted customers. But Heaton testified that even though Nelson was classified as a sales associate, she was used mostly as a stocker placing merchandise out on the shelves because that is where Heaton, the department manager, needed her the most. (Tr. 548.) Thus, the evidence supports a reasonable inference that the difference in classifications, as far as Bartick and Nelson were concerned, was actually a difference in name only.

The Respondent principally argues that Nelson was required to work the posted schedule because there was a growing need for personnel on the weekends. DM Shockley testified that he needed more coverage on the weekends. (Tr. 284.) He also stated that employees were not getting good direction on the weekends and that Nelson was probably the most qualified sales associate to help out on the weekends. Morey likewise testified that the Store needed more coverage on the weekends. However, he stated that he was concerned because Heaton, the department manager, was working almost every weekend, and Nelson was not. He further stated that he was irritated because

[18] Shockley denied that upper management ever instructed him to fire an employee because they supported a union. (Tr. 277.) However, he did not deny that he told Hager that the persons from corporate headquarters asked him why he had not fired her.

[19] The undisputed evidence shows that Nelson did not suffer any loss of hours, overtime or pay as a result of the change in her schedule.

"we were almost forcing our department manager to work the weekends just for customer service." (Tr. 529.)[20]

But Heaton testified that she worked Monday–Friday, and sometimes on Saturdays, at her discretion. (Tr. 547–548.) She also testified that she was upset when Nelson's schedule was changed because she needed Nelson to unload freight during the week. (Tr. 550–551.) Even Morey conceded that most of the Store's freight arrives during the week. (Tr. 533–534.) According to Heaton, she would have preferred if Nelson's schedule had not been changed "because they took her away from me, where I wanted her to work." (Tr. 551.) Thus, contrary to Morey's assertions, Heaton was not being "forced to work" on the weekends and Heaton also thought that there was a greater need for Nelson to work during the week.

The Respondent also asserts that Nelson was required to work from 7-4 p.m., rather than 6 a.m.-3 p.m., in order to provide coverage later in the day. Shockley testified that Nelson was needed to cover a gap in the evening. (Tr. 286.) His testimony was contradicted by ASM Branstrom who stated that there would have been coverage in the lawn and garden department regardless of whether Nelson left at 3 or 4 p.m. (Tr. 652.)

Thus, viewed as a whole shows that Nelson was needed more during the week than on weekends and that scheduling her to start an hour later did little, if anything, to improve the operation of the department.

In addition, the conflicting testimony of the Respondent's managers, and its department manager, raise questions about who actually made the decision to change Nelson's schedule. ASM Branstrom testified that she decided that everyone in the departments for which she was responsible, including lawn and garden, would follow the posted schedule. (Tr. 620.) Somewhat differently, Shockley testified that "the whole management team" was involved in the decision to change Nelson's schedule, including Shirley Heaton (Tr. 285.) In contrast, however, Heaton testified that she had no forewarning that Nelson's schedule was going to be changed. (Tr. 550–551.) She was surprised and upset to find out after the fact about the change. (Tr. 551–552.) In essence, she was told after the fact "this is what we're doing." (Tr. 551.) For demeanor reasons, I credit Heaton's testimony on this point.

Finally, the Respondent argues that Nelson's schedule was changed because of complaints by employees and department managers. Shockley testified that employees had complained that Nelson was not working weekends. (Tr. 335–336.) Branstrom testified that some department managers had complained for almost 2 years about Nelson working side-by-side with Heaton during the week. (Tr. 613, 617, 636.) Neither individual explained why the Respondent waited until the middle of a union organizing drive to change a long standing practice, known and condoned by management, of allowing Nelson to work other than the posted schedule.

[20] Morey's testimony that Heaton was working every weekend conflicts with Shockley's assertion that employees were not getting good direction on the weekends because who, other than the department manager, is better qualified to direct the work force.

I therefore find that based on the evidence viewed as a whole that the Respondent's reasons for changing Sherry Nelson's schedule are pretextual. Accordingly, I find that her scheduled was changed on October 1, 1998, because of her union activity in violation of Section 8(a)(1) of the Act.

3. The alleged 8(a)(4) violation

The complaint also alleges that Nelson's schedule was changed because she had been subpoenaed to appear and testify at the hearing on October 13, 1998. This allegation fails because there is no evidence that any one connected with the decision to change her schedule had knowledge of the subpoena prior to October 1.

Branstrom credibly testified that the decision to change Nelson's schedule was made in early September. Nelson received the subpoena on September 24. Shockley was on vacation at the time. (Tr. 237.) On Thursday, October 1, Branstrom spoke to Nelson about changing her schedule. Nelson testified that she told Branstrom and Shockley about the subpoena around the beginning of October. (Tr. 216.) Shockley heard about the subpoena after he returned from vacation on Monday, October 5. There is no evidence that Nelson told Branstrom or anyone else about the subpoena before her schedule was changed.

Accordingly, I shall recommend that the dismissal of the allegations contained in paragraph 6(c) of the complaint.

4. The alleged threat by stm vicky johnson

Nelson testified that on October 1, sometime before she was told by Branstrom that her schedule was being changed, she had a conversation in the breakroom with STM Vicky Johnson about her work schedule. According to Nelson, Johnson asked Nelson why she worked 6 a.m.-3 p.m., rather than the posted schedule. When Nelson explained that the early shift had been approved by Heaton and Shockley, Johnson told her to have a manager sign her schedule, otherwise it may come back to haunt her. (Tr. 217.) Johnson did not recall the conversation and with some prompting from the Respondent's counsel eventually denied that it ever occurred. For demeanor reasons, I do not credit her denial and I find that the conversation did occur as described by Nelson.

There is no evidence, however, that Johnson made the statement in a threatening manner or that she even mentioned the Union during her conversation with Nelson. Nor is there any evidence that she stated or implied what the ramifications might be if Nelson did not get her 6 a.m.-3 p.m. schedule approved in writing. Rather, the evidence does shows that Nelson and Johnson were engaged in casual conversation in an open area (the breakroom).

Thus, contrary to the General Counsel's assertions, I do not find that Johnson's comment was an prediction or statement of intent regarding the Respondent's planned discriminatory treatment of Nelson in violation of Section 8(a)(1) of the Act. Accordingly, I shall recommend the dismissal of the allegations of paragraph 5 of the complaint.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent's department store managers are not supervisors within the meaning of Section 2(11) of the Act.

4. The Respondent has violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Implementing and maintaining a broad rule prohibiting employees from discussing wages and benefits among themselves.

(b) Telling employees that they are not permitted to discuss their wages and benefits among themselves and threatening them with termination if they do so.

(c) Telling its department managers that they could not participate in union activities and that it would be unlawful for them to do so.

(d) Telling its department managers to report union activity to management.

(e) Implicitly threatening that an employee could be fired because of her union activity.

5. The Respondent has violated Section 8(a)(3) of the Act by changing the work schedule of Sherry Nelson because of her union activity.

6. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

7. The Respondent did not otherwise engage in any other unfair labor practices alleged in the consolidated complaints in violation of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent changed the work schedule of Sherry Nelson in violation of Section 8(a)(3) and (1) of the Act, I shall recommend that the Respondent be ordered to return Sherry Nelson to the work schedule she followed prior to October 1, 1998, and to refrain from changing her work schedule or the work schedule of any other employee for discriminatory reasons.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended [21]

ORDER

The Respondent, Wal-Mart Stores, Inc., Grand Rapids, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Implementing and maintaining a broad rule prohibiting employees from discussing their wages and benefits among themselves.

(b) Telling employees that they are not permitted to discuss their wages and benefits among themselves and threatening them with termination if they do so.

(c) Telling its department managers that they cannot participate in union activities and that it would be unlawful for them to do so.

(d) Telling its department managers to report union activity to management.

(e) Implicitly threatening that employees could be fired because of their union activity.

(f) Changing the work schedule of Sherry Nelson or any other employee because of their union activity.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, return Sherry Nelson to the schedule that she was working prior to October 1, 1998.

(b) Within 14 days after service by the Region, post at its facility in Grand Rapids, Minnesota, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 3, 1997.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. December 14, 1999

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT implement and maintain a broad rule prohibiting employees from discussing their wages and benefits among themselves.

WE WILL NOT tell employees that they are not permitted to discuss their wages and benefits among themselves and threaten to terminate them if they do so.

WE WILL NOT tell our department managers that they cannot participate in union activities and that it would be unlawful for them to do so.

WE WILL NOT tell our department managers to report union activity to management.

WE WILL NOT implicitly threaten our employees with termination because of their union activity.

WE WILL NOT change the work schedule of Sherry Nelson or any other employee because of their union activity.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed employees by Section 7 of the Act.

WE WILL schedule Sherry Nelson to work the hours and days that she worked prior to October 1, 1998, and WE WILL refrain from changing her work schedule or the work schedule of any other employee for discriminatory reasons.

WAL-MART STORES, INC.